

# **The Interplay between the Duty not to cause Significant Harm and Equitable and Reasonable Utilization Principle**

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## **Introduction**

States sharing freshwater resources have developed basic rules governing the use of these resources through their practice over many years. Some of the rules form part of customary international law, which is a body of unwritten law binding on all states. Countries sharing freshwater may also enter into treaties applying and adjusting rules of customary law to suit their specific situations with regard to the watercourses they share.<sup>1</sup>

In contemporary state and institutional practice of none state actors, two doctrines have attained supremacy. The first entitles riparian states to exploit international watercourses in an equitable and reasonable manner. The second principle cautions states to take appropriate measures in the utilization of trans-boundary Rivers such that significant harm to the share of other watercourse states is averted. Today these two principles are indisputably regarded as cornerstones of the regime of international watercourses law.<sup>2</sup>

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<sup>1</sup> Dinar, S. Dinar, McCaffrey & McKinney, *Bridges Over Water: Understanding Trans-boundary Water Conflict, Negotiation and Cooperation*, World Scientific Publishing Co. Pte. Ltd, 2007, vol.3, pp.64-65.[hereinafter Dinar et al., *Understanding Trans-boundary Water Conflict, Negotiation and Cooperation*].

<sup>2</sup> Tadesse Kassa, *International watercourses law in the Nile River Basin: Three States at a Crossroads*, (Routledge Taylor and Francis Group, London/New York), 2013, pp.148-149

This note tries to look in to the duty not to cause significant harm and its interplay with the equitable and reasonable utilizations rule. The presentation will also explore lingering issues of preeminence between the two principles which may be crucial in understanding the full scope of riparian rights and obligations in the international water basin.

## **1. The Duty not to Cause Significant harm under International Water Law**

The duty not to cause significant harm is one among the basic principles governing international water law. This duty is enshrined in various international water law instruments in different facets. There is general agreement that the principle has already achieved the status of customary international law.<sup>3</sup> In contemporary state practice, this principle stands among the few principles that has gained supremacy and come to be regarded as one of the cornerstones of the regime of international watercourse law. Beyond this, the rule has been enumerated in the pronouncements of numerous international governmental and nongovernmental organizations. It has also been referred to in judicial decisions as well as opinions of highly praised jurists.<sup>4</sup>

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[hereinafter Tadesse, *International watercourses law in the Nile River Basin: Three states at a crossroads*].

<sup>3</sup> Scholars like McCaffrey and Caflisch have concurred that this principle is firmly grounded in customary international law and is a general principle of international law. See generally Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, *Colo. J. Int'l Environmental Law & Pol'y*, Vol. 18:2, 2007, p.356.

<sup>4</sup> Well-known experts in the field of international water law, Caflisch, Dellapenna, McCaffrey, Wouters and others have in one way or another discussed that this principle is a basic obligation imposed upon watercourse states. In addition to these experts, the Trail Smelter arbitration award and Corfu Chanel case may also be cited in this regard.

The obligation “not to cause significant harm” derives from the theory of limited territorial sovereignty.<sup>5</sup> The theory of limited territorial sovereignty stipulates that all watercourse States have an equitable right to the utilization of a shared watercourse but must also respect the sovereignty of other States and their equitable rights of use.<sup>6</sup> This principle is widely accepted as it is one of the principles that serve as the foundation of the law of international watercourses and the UN Watercourse Convention.<sup>7</sup>

Historically, the no-harm rule has been identified with the maxim *sic uteretur alienum non laedas* which means “use your own not to harm that of another”.<sup>8</sup> This has itself been called “a reflection of the sovereign equality of states”.<sup>9</sup> It has been said that this rule “appears to have acquired customary force, as is attested by international practice”.<sup>10</sup> There is indeed little doubt that the *sic uteretur* or no-harm rule have acquired the status of customary international law and also broadly recognized as a general principle of international law.<sup>11</sup> Experts in international water law state that *sic uteretur*

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<sup>5</sup> [At WWW <http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-7-obligation-not-to-cause-significant-harm/7-1-commentary/>](http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-7-obligation-not-to-cause-significant-harm/7-1-commentary/), (last Visited 18/2/2016).

User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, [at WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>](http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule), (last visited 18/2/2016).

<sup>7</sup> User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, [at WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>](http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule), (last visited 18/2/2016).

<sup>8</sup> Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988), Extract from the Yearbook of the International Law Commission, 1988, vol. II(2), p. 35.

<sup>9</sup> Ibid, p.35

<sup>10</sup> Stephen McCaffrey, The law of international water course non navigation use, Oxford University Press, 2<sup>nd</sup> edition 2007 pp.415-416 [hereinafter McCaffrey, The law of international water course non navigation use].

<sup>11</sup> Ibid, p.416

occupies a firm place among the doctrinal bases for the obligation of states to avoid appreciable harm to other states, perhaps even more particularly with respect to harm transmitted via international watercourses.<sup>12</sup>

As described above, the duty not to cause significant harm calls for watercourse states to take all appropriate measures to prevent causing significant harm to other watercourse states. The inclusion of this duty in the UN watercourse convention and its placement in the section of the convention entitled “general principle” implies that it is a fundamental obligation in the field.

In its commentary, the International Law Commission (ILC) also reasoned that this reflected the equality of rights and sovereignty of all watercourse states, because, “in the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse states have equal and correlative rights to the uses and benefits of the watercourse.”<sup>13</sup> Thus, states' freedom of action and utilization of international rivers is limited by the reciprocal rights of other states in utilizing shared watercourses. This principle represents a further reflection of the limited territorial sovereignty theory.<sup>14</sup>

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<sup>12</sup> Ibid.p.416

<sup>13</sup> ILC, Report of the International Law Commission on the work of its forty-sixth session, As quoted by Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, *Colo. J. Int'l Environmental Law and Policy*, vol. 18, 2007, p.356.

<sup>14</sup> The theory of limited territorial sovereignty is based on the assertion that every co-riparian is free to use the waters of shared rivers within its territory on condition that the rights and interests of all the other co-riparian states are taken into consideration. In this case, sovereignty over shared waters is relative and qualified. The co-riparians have reciprocal

In the present days it is believed that states may not intentionally cause harm to another through, for example, flooding or deliberate releases of toxic pollution, questions are sometimes raised about whether one state's use that reduces the available supply in another state is prohibited by this norm.<sup>15</sup> However the principle obliges the watercourse states, when utilizing an international watercourse in their territory, to take all proper measures to avoid causing significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, as provided in the 1997 UN Watercourse Convention, the state causing the harm is required to "take all appropriate measures, having due regard to different factors, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation".<sup>16</sup>

## **2. The Principle of Equitable and Reasonable Utilization**

The principle of equitable and reasonable utilization can be seen as one of the most fundamental principles of international watercourses law which emerged in the Helsinki Rules and was further developed under the UN Watercourse Convention (1997). Article 5 of the convention provides for "equitable and reasonable utilization and participation."

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rights and duties in the use of the waters of common rivers. Physical unity creates a unique legal unity leading to the formulation of a 'community of interests,' and the waters of the shared rivers so become *res comunis*. See Dante A. Caponera, *Principle of Water law and Administration National and International*, 2<sup>nd</sup> edition, (Taylor & Francis, London, UK,), 2007, p. 213 [hereinafter Dante, *Principle of Water law and Administration National and International*].

<sup>15</sup> Grzybowski, McCaffrey & Paisley, *Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses*, *Global Business & Development Law Journal*, vol. 22, 2010, p.142.

<sup>16</sup> The UN Convention on the Law of the Non-navigational Uses of International Watercourses, adopted by the General Assembly of the United Nations by resolution 51/229, in its Fifty-first Session, on 21 May 1997, come in to force, August 17 2014 Articles 5, 6, 7(1) &7(2) (herein after UN Watercourse Convention).

The equitable utilization principle may be conceptualized as dividing the entire watercourse among states taking into account different factors. While Reasonable utilization looks at how water is used to determine if the purpose for which water is being used and the amount dedicated are reasonable under the circumstances.<sup>17</sup> This principle is “born” out of the principle of equitable apportionment. Apportionment is a division of the water among or between states. The legal principle of sovereign equality of states permits each state to use a share of the watercourse based on principles of equity.<sup>18</sup> By contrast, insistence by one state on exclusive sovereign rights over shared natural resources within its territory runs counter to the claims of other states to rights over the resources within their own territories.<sup>19</sup>

The equitable utilization rule applies specifically to international watercourses; it was developed primarily in the context of proceedings before domestic courts (notably in the United States), and its foundations today lie in customary international law.<sup>20</sup> This principle reflects the emerging view of shared natural resources which favors regulating the use of the international environment so as to manage the resource, as opposed to managing the

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<sup>17</sup> Margaret J. Vick, *The Law of International Waters: Reasonable Utilization*, Chi.-Kent Journal of International and comparative Law, vol. XII, No. 1, 2009, p.145.

<sup>18</sup> *Ibid*, p.146.

<sup>19</sup> B.A. Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, A publication of the Graduate Institute of International Studies, Geneva, 1985,p.55 [hereinafter Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*].

<sup>20</sup> Patricia K. Wouters, *Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States*, University of British Columbia Press, *The Canadian Yearbook of International Law*, Volume XXX, 1992,Pp.45-46

individual political entity.<sup>21</sup> The principle emphasizes that a state, albeit sovereign, cannot legally do as it pleases with trans-boundary water resources within its territory. Its essence is that states must act equitably and reasonably in dealing with these waters.<sup>22</sup> Interdependence among utilizations in river basins and international legal interdependence in respect to the protection of interests of all states belonging to that basin can be cited as the core reasons why the international community developed this principle for the utilization of international shared water course resources.<sup>23</sup>

In his treatise on the law of non-navigational uses of international watercourses, Stephen McCaffrey describes equitable utilization as follows: “born from the U.S. Supreme Court’s decisions in interstate apportionment cases beginning in the early twentieth century, and supported by decisions in other federal states, the doctrine of equitable utilization was applied to international watercourses as the basic, governing principle by the International Law Association’s 1966 Helsinki Rules.<sup>24</sup> Its status as the fundamental norm in the field has recently been confirmed by the decision of the International Court of Justice in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)... The 1997 UN Convention on the

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<sup>21</sup> David J. Lazerwitz, *The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses*, *Global Legal Studies Journal*, Vol. 1: 1993, P.259

<sup>22</sup> Notes and Comments /Notes et commentaries’, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, *The Canadian Yearbook of International Law* 1997,P.216

<sup>23</sup> The nexus between factual interdependence among utilizations within a given river basin and international legal interdependence in respect of the protection of interests of all states belonging to that basin has been affirmed as the basic premise in the drafting of an international convention on the subject matter. *Look First Report on the Law of the Non-navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/295 (1976) paragraph 38-39

<sup>24</sup> Margaret J. Vick, *Supra* note 17, p.145.

Law of the Non-navigational Uses of International Watercourses (Hereinafter called The 1997 UN Convention also appears to treat equitable utilization as the overarching principle governing the use of international watercourses, as did the draft articles adopted by the ILC on its second reading in 1994.”<sup>25</sup>

Equitable utilization entails the allocation, sharing and division of the resource and its benefits among riparian states. Equitable use is often referred to as a right to use water resources in a just and reasonable manner; it is not, however, the same as reasonable use.<sup>26</sup>

The 1997 UN Watercourse Convention calls for both equitable and reasonable sharing and for equitable and reasonable utilization. Article 5 of the convention states that: “watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits there from, taking into account the interests of the watercourse states concerned, and consistent with adequate protection of the watercourse.”<sup>27</sup>

Accordingly, article 5 introduces a new concept of equitable participation. The basic idea behind this concept is that in order to achieve a regime of equitable and reasonable utilization, riparian states must cooperate with each

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<sup>25</sup> McCaffrey, *Supra* note 10, pp. 384-385.

<sup>26</sup> When we talk about reasonable use we are referring to how far the utilization of the river is rational. Even if a use of an international watercourse has been identified as reasonable, it might still be challenged when balanced with other uses and examined through the lens of equity.

<sup>27</sup> UN Watercourse Convention, *Supra* note 16, Article 5(1).



other by taking affirmative steps, individually or jointly, with regard to the watercourse.<sup>28</sup> This means that the principle under the convention adds a concept of participation which empowers, and of course requires, all riparian states to maintain and work towards a process that enhances cooperative and effective utilization of shared water resources.

There is no doubt that a watercourse state is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every state whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of states results in every watercourse state having rights to the use of the watercourse that is qualitatively equal to, and correlative with, those of other watercourse states.<sup>29</sup> This fundamental principle of "equality of right" does not, however, mean that each watercourse state is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse state is entitled to use and benefit from the watercourse in an equitable manner. The scope of a state's right of equitable utilization depends on the facts and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 6.<sup>30</sup> Article 6 of the convention also provides a non-exhaustive list of factors

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<sup>28</sup> Ibid, Article 5(2). See also Stephen McCaffrey, The contribution of the UN convention on the law of the non-navigational uses of international watercourses, *International Journal of Global International Issues*, vol.1, nos.3/4, 2001, p.253.

<sup>29</sup> Report of the International Law Commission (ILC) on the work of its forty-sixth session. UN Doc. A/49/10 (1994), p.98, available at [WWW <http://www.un.org/law/ilc/index.htm>](http://www.un.org/law/ilc/index.htm).

<sup>30</sup> Ibid, p.98.

which shall be considered in the assessment of an equitable and reasonable utilization.<sup>31</sup>

### **3. The Interplay Between the Duty Not To Cause Significant Harm and Equitable and Reasonable Utilization**

In this part of the analysis, the relationship between the two principles will be explored. However the focus is on the interplay as enshrined under the 1997 UN Watercourse Convention. The equitable utilization rule and the principle which prescribes a duty not to cause significant harm constitute the basic principles of international water law. Hence, it is not surprising to see the two principles enshrined in agreements regarding the utilization and management of international watercourses. The normative content and the relationship between the principle of equitable utilization and the no harm rule in the field of watercourse law has been defined not only in the UN Watercourse

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<sup>31</sup> UN Watercourse Convention, *Supra* note 16, Article 6. Factors relevant to equitable and reasonable utilization: 1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

- (a) Geographic, hydro graphic, hydrological, climatic, ecological and other factors of a natural character;
- (b) The social and economic needs of the watercourse States concerned;
- (c) The population dependent on the watercourse in each watercourse State;
- (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
- (e) Existing and potential uses of the watercourse;
- (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation. 3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

Convention, but also in the works of l'Institut de Droit International (IDI) and the ILA.<sup>32</sup>

The relationship between the principle of equitable utilization, on the one hand, and that of no significant harm rule, on the other, continues to be, a subject of controversy.<sup>33</sup> The unresolved relationship between these two core principles of international water law has allowed states to maintain irreconcilable positions. In brief, the basic approach of international water law has been rooted in these core rules and in the underlying idea of mutual limitation of sovereign rights.<sup>34</sup> Under the principle of equitable utilization, riparian states are entitled to use international watercourses in a “reasonable” and “equitable” manner.<sup>35</sup> What is reasonable and equitable must be determined in each individual case and depends upon various factors, none of which has inherent priority. The mutual limitation approach also dictates that a state’s right to use its territory is limited by the duty not to cause significant harm to another state.<sup>36</sup>

It is necessary that the principle of equitable utilization and the duty not to cause significant harm each require precision in their application. Therefore, the issue of implementation must be examined on a case by case basis. The procedural rules of notification, exchange of information, and consultation

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<sup>32</sup>Patricia K. Wouters, *An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation*, *International Watercourse Law*, vol. 36, Spring, 1996, p.420.

<sup>33</sup> Notes and Comments/Notes et Commentaries, *Supra* note 22, p.221.

<sup>34</sup>A.S. Alsharhan and W.W. Wood, *Water Resources Perspectives: Evaluation, Management and Policy*, editor. Elsevier Amsterdam, The Netherlands, 2003, p.106.

<sup>35</sup> UN Watercourse Convention, *Supra* note 16, Article 5.

<sup>36</sup> *Ibid*, Article 7. It should be mentioned that this principle is not only part of international water law but also constitutes a cornerstone of international environmental law (see the 1972 declaration and 1992 Rio Declaration).

may assist in this task.<sup>37</sup> Additionally, the general duty to cooperate and the customary obligation that states peacefully settle their disputes encourage watercourse states to resolve any contests over water by agreement.<sup>38</sup>

It is worth clarifying in this connection that lower riparian states tend to favor the no harm rule, as it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparian states tend to favor the principle of equitable and reasonable utilization, because it provides more scope for states to utilize their share of the watercourse for activities that may impact downstream states.

In the 1983 Report of the International Law Commission on the work of its thirty-fifth session, it is stated: “It was considered essential to emphasize the duty of system States to refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States.”<sup>39</sup> It was said that, taken together with article 7, the two articles constituted a legal standard: reasonable and equitable use must not cause appreciable harm.”<sup>40</sup> This clearly shows how the relationships between the two principles are crafted. Beyond this, in the 1984 Report of the ILC on the work of its thirty-sixth session, it is stated that “the new wording provided a more acceptable

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<sup>37</sup> Wouters, *Supra* note 32, p.420.

<sup>38</sup> *Ibid*, p.420.

<sup>39</sup> Report of the International Law Commission on the work of its thirty-fifth session (3 May - 22 July 1983), Document A/38/10, Par. 246. P. 72, at [WWW <http://www.un.org/law/ilc/index.htm>](http://www.un.org/law/ilc/index.htm)

<sup>40</sup> During that draft Article 7 is Equitable sharing in the uses of an international watercourse system and its waters; whereas Art 9 talks about Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States. Look Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), Document A/38/10, Par. 246.

basis for an equitable international watercourse regime...[O]nce each State received its equitable share in the uses of such waters, it had sovereign powers to use that share provided no injury was done to others.”<sup>41</sup> In his 1986 second report concerning the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other, the Special Rapporteur explained the problem as follows. An equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs, for one or more States using the watercourse, but not entail a legal "injury" or be otherwise wrongful.<sup>42</sup> This is due to the fact that an international watercourse might not always be capable of fully satisfying the competing claims of all the States concerned.<sup>43</sup> The object of an equitable allocation is to maximize the benefits, while minimizing the harm, to the States concerned. Thus, where there is, for example, insufficient water in a watercourse to satisfy the expressed needs or claims of the States concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse that was, in fact, equitable.<sup>44</sup>

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<sup>41</sup> Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984), Document A/39/10, Par. 316, at WWW <<http://www.un.org/law/ilc/index.htm>.

<sup>42</sup> Report of the International Law Commission on the work of its thirty-eighth session (5 May - 11 July 1986), Document A/41/10, Par.240, at WWW <<http://www.un.org/law/ilc/index.htm>>

<sup>43</sup> Ibid, Par. 240.

<sup>44</sup> Ibid, Par. 240.

After a lengthy debate by the Working Group assigned for this task, a compromise regarding the relationship between the two principles was reached. The compromise addressed articles 5 and 6 (equitable and reasonable utilization) and article 7 (obligation not to cause significant harm).<sup>45</sup> The language of article 7 requires the watercourse state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6" which deal with the principles of equitable and reasonable utilization.<sup>46</sup>

Throughout the preparation of the draft articles on the UN Watercourse Convention, the framing of the concept of the duty not to cause significant harm underwent several changes, alternating between the duty not to cause "appreciable" versus "significant" harm.<sup>47</sup> Before article 7 was finalized, it had to pass through lengthy debates, especially with regard to the relationship it has with the principle of equitable utilization.<sup>48</sup>

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<sup>45</sup> Salman M.A. Salman (2007), *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?*, *International Water Resources Association Water International*, vol. 32, No. 1, March, p.6.

<sup>46</sup> *Ibid*, p.6.

<sup>47</sup> For Example, in the Report of the International Law Commission on the Work of Its work of Fortieth Session, which is held from 9 May - 29 July 1988, Article 8 was drafted as Obligation not to Cause 'Appreciable' Harm. However the International Law Commission on its forty-sixth session which held from 2 May-22 July 1994 the provision is drafted as the duty not to cause 'Significant' harm; which finally adopted in the final version of the UN Watercourse Convention.

<sup>48</sup> In 1993 the Special Rapporteur, Robert Rosenstock clarified to some extent by the commentary, he recommended that necessary changes be made in the text of article 7 for which he proposed a text. That revision would make "equitable and reasonable use" the determining criterion, except in cases of pollution, as defined in the draft articles. The Special Rapporteur's proposed redrafting of article 7 would impose on States only an obligation to "exercise due diligence", not an obligation not to cause appreciable or significant harm. Thus, where the use was equitable and reasonable, some harm would be allowable, with the result

In its present state under the convention, the principle provides that “watercourse states should, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other states”.<sup>49</sup> In the second part, the same article provides that where significant harm nevertheless is caused to another watercourse state, “the state whose use causes such harm shall, in absence of agreement to such use, take all appropriate measures having due regard for the provisions of Article 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.”<sup>50</sup>

A central debate in the protracted deliberations of the international law commission was whether to give precedence to the doctrine of equitable utilization or the “no significant harm” rule. The commission labored to reach an accommodation and produced a compromise that will probably not please anyone neither the downstream states nor the environmental community that pushed hard for a “no trans-boundary harm rule” nor the upstream states and the international water community that advocated for retention of the doctrine of equitable utilization.<sup>51</sup>

#### **4. Issue of preeminence**

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that equitable and reasonable would become the overriding consideration. Generally see A/48/10 The Report of the International Law Commission on the work of its forty-fifth session, 3 May - 23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, at [WWW <http://www.un.org/law/ilc/index.htm>](http://www.un.org/law/ilc/index.htm)

<sup>49</sup> UN Watercourse Convention, Supra note 16, Article 7(1).

<sup>50</sup> Ibid, Article 7 (2).

<sup>51</sup> Albert E.Utton, Which Rule should prevail in International Water Disputes: That of Reasonableness or that of No Harm, Natural Resources Journal, vol.36, 1996, p.635.

The core principles of international water law such as equitable utilization and the obligation not to cause significant harm will not stand alone. This is due to the fact that international rules require the consent of both upper and lower riparian states. For this reason, it is possible to look at the basic principles incorporated into the agreement of watercourse states.

Agreement on which of the two rules (equitable and reasonable utilization, and the obligation not to cause harm) takes priority over the other proved quite difficult to attain and the issue occupied the ILC throughout its 23 years of work on the convention.<sup>52</sup> Each rapporteur dealt with the issue differently, equating the two principles or subordinating one principle to the other.<sup>53</sup> The issue was discussed by the Sixth Committee of the United Nations (the Legal Committee), which was convened as the Working Group of the Whole. Sharp differences within the Working Group between the riparian states concerning these two principles dominated the discussion.<sup>54</sup>

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<sup>52</sup> Salman M.A. Salman, Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses, *Water International* Vol. 35, No. 4, Rutledge Taylor & Francis Group, 2010, p.354.

<sup>53</sup> For example, the Special Rapporteur Rosenstock, in his first report in 1993, reversed precedent in favor of the principle of equitable utilization. However, in the 1988 40<sup>th</sup> session it is stated that “[a] watercourse State's right to utilize an international watercourse [system] in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—prima facie, at least—utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm. Thus a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is ‘equitable’, in the absence of agreement between the watercourse States concerned. See Report of the International Law Commission on the work of its fortieth session, 9 May-29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No.10,p.36.This shows that there seems to have been some sort of priority given to the duty of that State not to cause appreciable harm to other watercourse States.

<sup>54</sup> Salman M.A. Salman, *Supra* note 52, p.354.



International law seems to favor the equitable use principle over the obligation not to cause significant harm. The UN Watercourse Convention incorporates equitable use and significant harm without any indication as to which is preeminent, but scholarly interpretation of the convention's language—from which the concepts are drawn—assigns primacy to equitable utilization.<sup>55</sup> Similarly, the ICJ emphasized the need for equitable utilization of the Danube River in the *Gabcikovo-Nagymaros* case that involves Hungary and Slovakia, but made no explicit reference to significant harm.<sup>56</sup>

The issue of preeminence of the equitable use doctrine could also be considered from a different dimension. The principle of equitable utilization, which evolved from early inter-state practice involving watercourses, determines the legitimacy of a use by balancing all factors relevant to a particular case and determining whether the use is an equitable and reasonable one.<sup>57</sup> The “no significant harm” rule, which originated as a general principle of law in inter-state relations, precludes, in the context of international watercourses, uses that result in significant harm to another state.<sup>58</sup> The conflict between the two principles is readily apparent. While the former rule might permit significant harm as a result of an equitable use of the watercourse, the latter would not.<sup>59</sup>

The net effect of the organization of the two principles under the convention, as some have argued, the convention purports to put the obligation not to

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<sup>55</sup> Fasil Amdetsion, *Where Water is Worth More than Gold: Addressing Water Shortages in the Middle East & Africa by Overcoming the Impediments to Basin-Wide Agreements*, SAIS Review, Johns Hopkins University Press, vol. 32, No. 1, 2012, P.180.

<sup>56</sup> *Ibid*, p.180.

<sup>57</sup> Wouters, *Supra* note 32, , p.419.

<sup>58</sup> *Ibid*, pp.419-420.

<sup>59</sup> *Ibid*, p.420.

cause significant harm on a par with the principle of equitable utilization.<sup>60</sup> The implication of article 7 would be that if significant harm is not prevented, it follows the use of the state concerned will be challenged even if it is within the margin of equitable and reasonable utilization. This can be inferred from the specific obligation imposed upon watercourse states to make compensation in cases where the action of the state causes significant harm, the equitability of uses notwithstanding. But this should not us to conclude that the duty not to cause significant harm rule superior than the equitable and reasonable utilization principle. It is provided in the ILC commentary that ‘...the fact that an activity involves significant harm would not of itself necessarily constitute a basis for barring it. In certain circumstances "equitable and reasonable utilization" of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.’<sup>61</sup>

Obviously, there cannot be a guarantee that no ‘harm’ will result from the equitable use of an international watercourse. Once it is established that a particular use is equitable and reasonable, it is implied that every effort must have been made not to cause significant harm to another watercourse state (obligation of conduct). No more should be expected of the state that has

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<sup>60</sup> FissehaYimer, An Assessment of the convention on the law of the Non-navigational uses of international uses of international waterways, *Ethioscope*, a periodic magazine published by the Press, Information and Documentation Directorate of the Ministry of Foreign Affairs, vol.3, No.2, 1997, p.18.

<sup>61</sup> Report of the International Law Commission on the work of its forty- sixth session (2 May- 22 July 1994), Extract from the Yearbook of the International Law Commission, 1994, vol. II(2), P.103

equitably and reasonably utilized the international watercourse. That is why the primacy of the principle of equitable utilization has been preserved.<sup>62</sup> What is expected from the watercourse state is to make compensation in cases where the other watercourse state has suffered significant harm. Because the convention has stated that where significant harm nevertheless is caused to another watercourse state, the states whose use cause such harm are required to take all appropriate measures to eliminate or mitigate such harm. This means though the states are required to mitigate the harm, so long as the watercourse states' utilization is within the margin of equitable utilization, it seems that they are not required to stop their utilization. What they are required to do is to mitigate the harm by taking all appropriate measures and in case harm is occurring to discuss the question of compensation, depending on the situation.

Though the lower and that of the upper riparian states took positions that might benefit them; however, it has also been held widely that every international water basin must developed so as to render the greatest possible service to the whole community through which it flows, even though that community may be divided by political frontiers.<sup>63</sup>

It is possible to analyze the different stands and attitudes that watercourse states take with regard to how far the UN Watercourse Convention is cited in regard to which rule takes supremacy in cases of conflict. Lucius Caflisch presented an analysis of the convention's formulation, noting that the new

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<sup>62</sup> Fisseha Yimer, *Supra* note, 60, p.18.

<sup>63</sup> *British Yearbook of International Law*, 1930, pp. 195-196, as cited by Mohammad Tufail Jawed, *Rights of the Riparian*, *Pakistan Horizon*, vol. 17, No. 2 (Second Quarter, 1964), and p.141.

formula<sup>64</sup> was considered by a number of lower riparian states to be sufficiently neutral not to suggest a subordination of the no harm rule to the principle of equitable and reasonable utilization. A number of upper riparian states thought just the contrary, namely, that the formula was strong enough to support the idea of subordination of the no harm rule to the principle of equitable utilization.<sup>65</sup>

On the contrary, significant upper riparian states such as Ethiopia and Turkey have, in their explanations of voting during the adoption of the convention, made their position clear on this issue; Ethiopia stated that article 7 was one of the grounds for abstaining on the convention, while Turkey argued that the convention should have established the primacy of the principle of equitable and reasonable utilization over the obligation not to cause significant harm.<sup>66</sup> However, notwithstanding such differing views among states, the prevailing approach, in the view of many renowned scholars, remains that the convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization. This conclusion has been based on a close reading of articles 5, 6 and 7 of the convention.<sup>67</sup>

A careful reading of articles 5, 6 and 7 of the convention should lead to the conclusion that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable and reasonable utilization. Thus, it can be concluded that, much like the Helsinki Rules, the principle of

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<sup>64</sup> The new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6".

<sup>65</sup> Salman, *Supra* note 45, p.6.

<sup>66</sup> Fisseha, *Supra* note 60, p.18.

<sup>67</sup> Salman, *Supra* note 45, p.6.

equitable and reasonable utilization is the fundamental and guiding principle of the UN Watercourse Convention.

Many experts in the field of international law also believe that the Watercourse Convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization.<sup>68</sup> For example, McCaffrey has argued that a downstream state that was first to develop its water resources could not foreclose later developments by an upstream state by demonstrating that the later development would cause it harm. Under the doctrine of equitable utilization, the fact that the downstream state was “first to develop” (and thus had made prior uses that would be adversely affected by new upstream uses) would be merely one of a number of factors to be taken into consideration in arriving at an equitable allocation of the uses and benefits of the watercourse.<sup>69</sup> The right of late-coming riparians to utilize resources of an international watercourse would still remain qualified by the duty not to cause significant harm, except as may be allowed under equitable utilization of the watercourse concerned.<sup>70</sup>

In his Second Report during the codification of the UN Watercourse Convention, Special Rapporteur McCaffrey also recommended that the no significant harm articulation should be redrafted in such a way as to bring it

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<sup>68</sup> Bourne 1997, Caflisch 1998, Paisley 2002, McCaffrey 2007, Salman 2007—all as cited by Salman M.A. Salman, Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses, *Water International*, vol. 35, No. 4, July 2010, Rutledge Taylor & Francis Group. p.355.

<sup>69</sup> Stephen C. McCaffrey, *The Law of international watercourses: Some recent Developments and Unanswered Questions*, *Den. Journal of International Law and Policy*, vol. 17:3(1989), p. 509.

<sup>70</sup> Tadesse Kasa, *Supra* note 2, p.257

into conformity with the principle of equitable utilization.<sup>71</sup> He said that the focus should be on the duty not to cause legal injury (by making a non-equitable use) rather than on the duty not to cause factual harm. In the context of watercourses, suffering even significant harm may not infringe on the rights of the harmed state if the harm is within the limits allowed by an equitable utilization.<sup>72</sup> However, he also recommended in his Fourth Report that, in matters involving pollution harm, the “no appreciable harm” threshold should be the fundamental rule.<sup>73</sup>

Under Article 7(2) of the UN Watercourse Convention, it is stated that where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of an agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

Based on these provisions of the UN Watercourses Convention, a State must always give “*due regard*” to the principle of equitable and reasonable utilization whenever significant harm occurs.<sup>74</sup> However, there is no reciprocal obligation of “*due regard*” to the principle of no significant harm

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<sup>71</sup> McCaffrey, Second Report on the Law of the Non-Navigational Uses of International Watercourses, p.133, as cited by Wouters, Supra note 20, p.47.

<sup>72</sup> Ibid, p.47.

<sup>73</sup> S. C. McCaffrey, Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, UN, international Law Commission, 40<sup>th</sup> Session, UN Doc.A/CN.4/ 412/Add.2 (1988).

<sup>74</sup> At WWW <<http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf>>, (last visited 18/02/2016).

when States are determining if a use or uses are equitable and reasonable. This crucial distinction is what has led many legal scholars to conclude that the duty not to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilization.<sup>75</sup>

While it is clear that this paragraph does not entirely solve the problem of which rule takes precedence, it strongly suggests that if a state's use is equitable, it should be allowed to continue, even if it causes significant harm to another state. If such harm is caused, the reformulation suggests that the harming state would be obligated to minimize the harm to the extent possible and to compensate the other state for any unavoidable harm.<sup>76</sup>

However, as Wouters notes, there are some scholars who argue that the obligation not to cause significant harm remains the governing rule under the Watercourse Convention. Most also argue that article 7(2) of the convention reduces the principle of equitable utilization to a mere factor to be considered in consultations where significant harm occurs.<sup>77</sup> Based on the construction of these provisions of the UN Watercourse Convention, therefore, a state must always give "due regard" to the principle of equitable and reasonable utilisation whenever significant harm occurs. However, there is no reciprocal obligation of "due regard" to the principle of no significant harm when states determine that a use or uses are equitable and reasonable. This crucial distinction is what has led many legal scholars to conclude that the duty not

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<sup>75</sup> Ibid.

<sup>76</sup> Stephen C. McCaffrey, *An Assessment of the Work of the International Law Commission*, *Natural Resources Journal*, Vol. 36, spring 1996, p.312.

<sup>77</sup> Wouters, *Supra* note 32, pp.423-424.

to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilisation.<sup>78</sup>

Though the drafters of the Watercourse Convention took different positions with regard to this principle, it is possible to conclude that interpretation of the UN Watercourse Convention has interpreted the text in a way that does not seem to absolutely prohibit causing significant harm.<sup>79</sup> Instead, the threshold of state obligation is the exercising of “all appropriate measures” to prevent causing such harm.<sup>80</sup>

There may be questions raised concerning the effect of language that are used in the Convention such as “take all appropriate measures”. It is clear that this type language is generally regarded as reflecting a due diligence obligations imposed on the watercourse states. Moreover, quite a number of experts have noted that if the no harm rule took precedence over that of equitable utilization, the effect would be to freeze the right to development of many riparian states.<sup>81</sup> If we give more protection to the state which is already

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<sup>78</sup> User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, at [WWW <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>](http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule), (visited 18/02/2016).

<sup>79</sup> The ILC commentary confirms this: “The obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur.” See Report of the International Law Commission on the work of its forty-sixth session, U.N. Doc. A/49/10 (1994), p.237.

<sup>80</sup> UN Watercourse Convention Supra note 23, Article 21(2) of the 1997 Convention enjoins states to “prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse...”

<sup>81</sup> Stephen McCaffrey, *The Law of International Watercourses: Some Recent Developments and Unanswered Questions*, *Denver Journal of International Law and Policy*, Vol.17 (2), 1988-1989, p.509.



making use of the resources of the international watercourse, irrespective of whether or not other watercourse states have obtained an equitable share in those resources and could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from their use, the result would be that the most developed states—generally the first to derive benefit from the watercourse—would be favoured to the detriment of developing states, which would normally be late comers in developing and utilizing international watercourses. Solutions must be envisaged with a view to achieving a balanced regime that would ensure that the freedom of a state to use its watercourse is not already unduly restricted while also adequately safeguarding the freedom from harm of other states.<sup>82</sup>

On the other hand, it should be mentioned here that it is the “no appreciable harm” standard, rather than the principle of equitable use, that is applied in cases of pollution. This is a practical solution, given that pollution must be reduced on all levels, not just balanced in one state against the beneficial uses in another.<sup>83</sup> Use of the waters of an international watercourse that causes significant pollution or any harm to the ecosystem is *ipso facto* unlawful; it is unlawful not because it is in fact unreasonable and inequitable but because it is deemed to be so.<sup>84</sup>

The ILC's position with respect to pollution harm is more stringent than the general rule encapsulated in article 7. Article 21 of the convention contains a

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<sup>82</sup> Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984), Document A/39/10, par.339, at [WWW <http://www.un.org/law/ilc/index.htm>](http://www.un.org/law/ilc/index.htm)

<sup>83</sup> David J. Lazerwitz, The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses, *Global Legal Studies Journal*, Vol. 1, 1993, p.260.

<sup>84</sup> *Ibid*, p. 220.

solid prohibition of pollution that “may cause significant harm” to the other watercourses.<sup>85</sup> The ILC’s Special Rapporteur concluded on many occasions that “water uses that cause appreciable pollution harm to other watercourse states and the environment could well be regarded as being *per se* inequitable and unreasonable.”<sup>86</sup>

## 5. Conclusion

The relationship between the principles of equitable utilization, on the one hand, and the duty not to cause significant harm, on the other, has been and continues to be a subject of controversy. The unsettled correlation between these two core principles of international water law has allowed states to maintain conflicting positions. The conflict between the principle of equitable utilization and the “no significant harm” rule is readily apparent. While the former might permit significant harm as a result of an equitable use of the watercourse, the latter would not.<sup>87</sup>

There can be not be guarantee that some ‘harm’ will not result from the equitable use of an international watercourse. Once it is established that a particular use is equitable and reasonable, it implicitly entails that every effort have been made not to cause significant harm to another watercourse

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<sup>85</sup> *Supra* note 16. Article 21(2) states that Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

<sup>86</sup> Steven McCaffrey, Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, cited in Y.B. Int’l L. Comm’n at 241, U.N. Doc A/CN.4/412/Add.2 (1988).

<sup>87</sup> Wouters, *Supra* note 32, p.420.

state (obligation of conduct); no more should be expected of the state which has equitably and reasonably utilized the international watercourse. That is why most scholars on the subject have confirmed the primacy of the principle of equitable utilization. What is expected is that the watercourse state takes all appropriate measures which deemed necessary.

However if the “no harm” rule took preference over that of equitable utilization, the effect would be to freeze the right to development of many riparian states through the employ of international watercourses.<sup>88</sup> If we give more protection to the state which is already making use of the resources of the international watercourse, irrespective of whether or not other watercourse states have obtained an equitable share in those resources, this could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from watercourse use. The result would be that the states which have been the first to derive benefit from watercourses would be favored to the detriment interest of the states which fail to develop earlier in time, which would normally be late comers in developing and utilizing international watercourses, which mostly a developing nation.

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<sup>88</sup> McCaffrey, *Supra* note 81, p.509.